IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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SUPREME COURT, U.S.

No. 76-889

FRANCIS H. MALONEY
Commissioner of Children and Youth Services for the State of Connecticut,

Appellant,

v.

LADY JANE, ET. AL.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO AFFIRM OR DISMISS

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March 18, 1977

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Pursuant to Rule 16 of the Rules of this Court, Appellees move to affirm the final judgment of the District Court on the ground that the question presented by this appeal is so unsubstantial as not to warrant further argument. In the alternative appellees move to dismiss this appeal since the appellant has changed the challenged regulation.

OPINION BELOW

The opinion of the three-judge District Court in this case is reported at 420 F. Supp. 318. It is also reprinted in Appendix A of Appellant's Jurisdictional Statement.

QUESTION PRESENTED

Whether the Connecticut Department of Social Services Abortion Services regulation, as set forth in Manual Volume 3, Chapter III, Section 275 (Jurisdictional Statement, Appendix D), which requires the written consent of the Commissioner of Children and Youth Services, as guardian, before an abortion can be performed for a state ward imposes a blanket consent provision that violates the First and Fourteenth Amendments to the United States Consitution.

STATEMENT OF THE CASE

This action was commenced in the District Court by the named plaintiff on October 29, 1974. Subsequently, eleven additional plaintiffs were permitted to intervene. At the time of her entrance into the case each plaintiff was a minor, having not yet attained the age of 18; was a ward of the State of Connecticut; was pregnant; with the currence of her physician desired to have an abortion; had requested the defendant's consent, as her guardian, for the abortion; and had been denied that consent. The named plaintiff and ten of the intervenors obtained temporary restraining orders which ordered the defendant

to refrain from refusing to consent in writing to the abortions requested by tne plaintiffs. The eleventh intervenor was voluntarily dismissed from the case before such an order was obtained. Each plaintiff had her abortion performed shortly after obtaining the order. Each plaintiff has been permitted to prosecute this suit in a fictitious name.

Connecticut General Statutes Section 17-62(d) provides, in part, that the Commissioner of Children and Youth Services, after April 1, 1975, or the Commissioner of Social Services, before April 1, 1975, is the guardian for all children (under 16 years old) and youth (16 and 17 years old) who have been committed to him by the Juvenile Court. The committed minors are commonly referred to as state wards.

The defendant was Nicholas Norton, Commissioner of Welfare, when this action was commenced. He left office on or about January 8, 1975, and was succeeded temporarily by Acting Commissioner John F. Harder. On or about February 1, 1975, Edward W. Maher became Commissioner of Welfare. On June 25, 1975, Public Act 75-420, Section 4 changed the name of the Department of Welfare to the Department of Social Services. On April 21, 1975, defendant Maloney was joined as a defendant since Public Act 74-251 amended Connecticut General Statutes Section 17-62(d), effective April 1, 1975, by vesting guardianship of all state wards in Maloney.

Following discovery, the District Court heard arguments on plaintiffs' motions to certify the class and for summary

Judgment on June 10, 1975. The District Court filed its Memorandum of Decision on September 21, 1976, (J.S., App. A) and Judgment on October 7, 1976, (J.S., App. B). The notice of appeal was filed on November 3, 1976, (J.S., App. C).

Connecticut has no statute which establishes a consent requirement before an abortion can be performed for a minor. However, it is a common practice for hospitals and physicians to require parental or guardian consent before an abortion is performed for a minor. The reason for this requirement is the doctors' fear of potential civil liability under a common law battery theory.

The challenged regulation was adopted by defendant Maloney (J.S., App. E) who has no formal or informal, written or unwritten guidelines or standards which are followed in reviewing requests for approval of abortions by state wards (J.S., App. E). The only standard for review of these requests is the medical judgment of David Galinsky, M.D., of the Division of Health Services of the Department of Social Services. Dr. Galinsky did not examine any of the plaintiffs. He is not an obstetrician gynecologist, psychiatrist or psychologist. (See excepts from Stipulation as to Facts which appears as Appendix A to this motion).

ARGUMENT

At the outset, appellees' counsel is obligated to advise this Court that the appellant has revised the challenged regul

tion, effective January 16, 1976, (See Appendix B). Fusari v. Steinberg, 419 U.S. 379 (1975), Concurring Opinion by Chief Justice Burger. Counsel first learned of this change subsequent to the District Court's decision when researching another case. This change was never communicated by appellant's counsel to the Court or to appellee's counsel. It should be noted that this revision is most likely invalid under Connecticut law since the procedures of the Uniform Administrative Procedure Act, Connecticut General Statutes Section 4-166 et. seq. were not followed.

The regulation challenged here clearly is a blanket provision such as the one that was struck down by this Court in Planned Parenthood of Central Missouri v. Danforth, ___U.S. ___, 44 L.W. 5197 (July 1, 1976).

Appellant argues that he should be allowed to participate in the decisions to have or not to have abortions that are made by his wards. Yet, he has never seen fit to promulgate standards by which to determine when an abortion should or should not be performed. He argues that proper medical care must be taken yet the record clearly indicates that his doctor who reviews each request for consent is not an obstetrician, gynecologist, psychiatrist or psychologist. Additionally his doctor never meets or examines the young women involved.

Assuming that a constitutional role for a guardian exist as the appellant contends, he has made no attempt to define t role with regulations. Further, he is so far removed from h wards that it is an extraordinary situation when he personal

knows one of them. He is so far removed from the young women that he has no contact with the physical and emotional trauma that they may experience in deciding whether or not to have an abortion. He is clearly not in the same position as a natural parent who has raised his or her daughter from birth.

CONCLUSION

For the reasons stated, it is submitted that the question presented is so clearly unsubstantial that the judgment of the District Court should be affirmed. Alternatively, since the challenged regulation has been revised, the appeal should be dismissed.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM STIPULATION AS TO FACTS

11. David Galinsky, M.D., of the Division of Health Services, Connecticut State Welfare Department, reviewed for medical sufficiency each plaintiff's request for approval of her abortion.

12. Doctor Galinsky did not personally examine any of the plaintiffs.

13. Doctor Galinsky is a gasteroenterologist (specialist in stomach and intestines). Doctor Galinsky is not an obstetrician, gynecologist, psychiatrist or psychologist.

14. The defendants have no formal or informal, written or unwritten guidelines or standards, other than Doctor Galinsky's medical judgment, that were used in reviewing plaintiffs' requests for approval of their abortions.